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Case No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1995

EUGENE JAMES MUSTIN,

Petitioner

vs.

PAMELA WITHROW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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10 pp

QUESTIONS PRESENTED

1. Whether the evidence presented against the Petitioner-Appellant was sufficient to support a conviction for second degree murger as an aider and abettor where the evidence presented would not allow any rational trier of the facts to find the essential elements of the crime beyond a reasonable doubt.

2. Whether Petitioner-Appellant was erroneously denied his sixth amendment right of confrontation where a verbal confession of one of defendants implicating the other non-testifying co-defendant was read over objections during trial subsequent to grant of motion in limine excluding defendant's confession.

   A. Whether the reading of the co-defendant's confession by the police officers made the redacted confession ineffective where the redacted confession was read to the court and jury while the three co-defendants sat with their respective counsels at the defendants table

from which they were introduced and identified to the court and jury.

3. Whether the statement by the sole eyewitness during trial that "they went after him, Thoreau" provided a sufficient basis upon which to predicate an inference that Petitioner-Appellant aided and abetted the second degree murder, especially when this same witness on cross examination acknowledged he observed no affirmative conduct on part of Petitioner-Appellant associated with perpetration of the second degree murder.

LIST OF PARTIES AND RULE 28.1 LISTING

The parties to the habeas corpus proceedings were the petitioner, Eugene James Mustin and Pamela Withrow. These same parties were parties at trial in the United States District Court Eastern District and the appeals flowing therefrom in the United States Court of Appeals, the Sixth Circuit and the United States Supreme Court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EUGENE JAMES MUSTIN,

Petitioner

v.

PAMELA WITHROW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Eugene James Mustin, respectfully prays that a writ of certiorari issue to review the United States Court of appeals for the Sixth Circuit affirmation of the United States District Court for the Eastern District of Michigan denial of petitioner's request for habeas corpus relief under 28 USC 2254, entered in the above-entitled cause on January 18, 1995.

OPINIONS/ORDERS BELOW

The January 18, 1995 per curiam opinion of

the Court of Appeals whose judgment of denial herein sought to be reviewed is not reported and is reprinted in Appendix A to this Petition, PPA1-

The Order of dismissal by the Honorable Cohn, United States District Court dated October 29, 1993, Appendix B.

Report and Recommendation of Magistrate Paul Komives filed September 8, 1993, Appendix C.

Michigan Supreme Court Order Denying the Appeal from opinion of the Michigan Court of Appeals dated June 4, 1992, Appendix D.

Michigan Court of Appeals opinion, File #116199, Appendix E.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1995. The jurisdiction of this court is invoked pursuant to 28 USC Section 1254 (11) and 28 USC Sup. Ct. Rule 3.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Amendments 5th, 6th and 14th of the United

States Constitution.

STATEMENT OF THE CASE

Petitioner-Appellant, Eugene James Mustin, is incarcerated at a Michigan penal institution by virtue of his conviction as an aider and abettor of second degree murder, MCL 750.317, MSA 28.549, by a jury in the Macomb Circuit Court (State of Michigan). On May 22, 1989, the petitioner was sentenced to imprisonment for 20 to 60 years based on his conviction of aiding and abetting a second degree murder.

On June 14, 1989, petitioner filed his Claim of Appeal in the Michigan Court of Appeals. The Michigan Court of Appeals affirmed the conviction of the petitioner.

On October 23, 1992, petitioner filed an application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court refused to hear his appeal.

Subsequently, on January 5, 1993, petitioner filed his petitioner filed his petition for writ of habeas corpus under 28 USC 2254 (state custody)

with supporting brief in the United States District Court Eastern District.

Following answer and reply by respondent-appellee and petitioner-appellant respectively, the Report and Recommendations filed by Magistrate Paul J. Komives on September 8, 1993 recommended that the petitioner-appellant request for writ of habeas corpus relief be denied.

In response, the petitioner-appellant filed objections to the Report and Recommendations of Magistrate Komives on October 4, 1993.

On October 29, 1993, an Order of Dismissal of writ of habeas corpus was issued by the Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan (adopting in full Magistrate Komives recommendation).

On November 9, 1993, petitioner-appellant filed his Notice of Appeal from the doer of dismissal and on November 9, 1993, petitioner-appellant followed this up by filing a request for issuance of certificate of probable cause. On February 2, 1994, the Honorable Avern Cohn issued the Certificate of Probable Cause to

appeal.

The thrust of petitioner-appellant's habeas corpus petitioners have been:

1. There was insufficient evidence in the record for the jury to convict the petitioner as an aider and abettor to the second degree murder.

2. There has been the ingrafting of facts by the Court of Appeals non-existent in the record that has led to insupportable inference(s) of Petitioner's conduct or intent necessary to sustain the aiding and abetting conviction of second degree murder.

3. The admissibility of the redacted confession of one of the non-testifying co-defendants violated the petitioner's 6th Amendment right to confrontation and cross-examination where inspite of redaction, the reading of non-testifying co-defendant confession before the jury while the petitioner, along with the confessing co-defendant, remained at the defense table, provided strong implication of guilt by association.

4. The redacted confession of one of the non-testifying co-defendants became inextricably connected to the Petitioner's due process claim of insufficiency of evidence, especially in those circumstances involving a close case where such admissibility impropiety might have tipped the scale prejudicing the petitioner.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The judgement sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit in the case entitled Eugene James Mustin (Petitioner-appellant) versus Pamela Withrow, Warden (Respondent-Appellee), Case No. 93-2443.

In this regard, the judgement of the United States Court of Appeals for the Sixth Circuit on January 18, 1995 per curiam affirmed the judgement of the United States District Court.

Prior to the above secision, the United States District Court's jurisdiction was invoked on the basis of violation of the Petitioner's-Appellant's Fourteenth Amendment right to/of due process in the state court and the fact that the evidence presented against Petitioner-Appellant was insufficient to support a conviction in that "when viewed in the light most favorable to the prosecution, the evidence would not allow any rational trier of the facts to find the essential elements of the crime beyond a reasonable doubt."

See Weaver v Fotz, 888 F2d 1097 (6th Cir. 1989) and Jackson v Virginia, 443, US 307; 99 S Ct 2781, and on violation of his sixth Amendment right of confrontation.

The admissible evidence presented to the Corut and jury subsequent to the granting of Petitioner's Motion in Limine relative to Mr. Chatman's confession, the granting of Petitioner's Motion to Suppress testimony relating to vandalizing of automobiles belonging to the white youths by the Defendants, and Mr. Jason Titus' testimony that he had not seen petitioner commit any act of violence toward the deceased was insufficient to sustain Mr. Mustin's conviction as an aider and abettor.

Furthermore, the supposed readacted statement of Mr. Chapman was read to the court and jury while the three defendants sat with their counsels at the Defendant's table from which they were introduced and identified to the Court and jury. The manner of presentation of the redacted statements made them totally ineffective. The Bruton violation made the

redaction totally ineffective. (United States v Bruton, 391 US 479).

II. THE ADMISSIBLE EVIDENCE PRESENTED TO THE COURT AND JURY, SUBSEQUENT TO THE GRANTING OF PETITIONER'S MOTION IN LIMINE RELATIVE TO MR. CHATMAN'S CONFESSION, THE GRANTING OF PETITIONER'S MOTION TO SUPPRESS TESTIMONY RELATING TO VADALIZING OF AUTOMOBILES BELONGING TO THE WHITE YOUTHS BY THE DEFENDANTS, AND MR. JASON TITUS' TESTIMONY THAT HE HAD NOT SEEN PETITIONER COMMIT ANY ACT OF VIOLENCE TOWARD THE DECEASED, WAS INSUFFICIENT TO SUSTAIN MR. MUSTIN'S CONVICTION AS AN AIDER AND ABETTOR, ESPECIALLY SINCE THE ALLEGATION THAT MR. MUSTIN AND MR. CHATMAN "CHASED AND BROUGHT DOWN THE VICTIM" IS STRICTLY A FIGMENT OF THE IMAGINATION OF THE COURT OF APPEALS JUDGES.

Counsel for respondent-appellee apparently prediactes his argument that Mr. Mustin committed an act in furtherance or assistance of the commission of the offense of second degree murder upon recross examination of Mr. Titus by Mr. Smith and by Mr. Viviano contained on Page 6 and 7 and 8 of the magistrate's report and

recommendations:

By Mr. Smith:

"Q Mr. Titus, you testified that there was one individual who during all of the struggle of whatever altercations you observed, you saw committing no violence, is that correct?

"A That's right.

"Q And that's the person?

"A Right.

"Q And that's testimony that you gave to us, is that correct?

"A Right.

"Mr. Smith: No further questions, Your Honor.

"By Mr. Viviano:

"Q Mr. Titus, you indicated that, and you pointed to Harry Houston as the person who attacked you, is that correct?

"A That is correct.

"Q And now I take it that at some other time you indicated that Mr. Mustin just stood there, is that correct?

"A Standing in that general area, right.

"Q Okay. Now, did you see Mr. Mustin's face or just a shadow or figure?

"A Well, someon matching his description.

"Q Okay. Someone matching his description. So then any person who would match his description you would identiy, is that correct, whatever is name would have been if he was sitting at that table?

"A Apparently.

"Q And isn't it a fact that that's why you identified him the last time you were in court because he was sitting at that table or a table like this?

"A Well he - he fits his own description.

"Q Now, Mr. Titus, I'm going to ask you, when you were riding your bike down here and you said a man ran out from behind the van, who you now are identifying as Mr. Houston?

"A No, in front of.

"Q In front of the van, who you are now identifying as Mr. Houston, was there just one man there, two or three or four or more, or how many did you see? Just Mr. Houston?

"A Could you bring me the photograph, I think I can explain it better that way.

"Q Do you understand the English language?

"A I do.

"Q Listen to my question. When you saw the person you claim as Mr. Houston run in front of the van out into the street at you, correct, was he alone or was there other people with him?

"A There were other people with him.

"Q Was there one person or two or three?

"A Two others.

"Q Two others. Did they also run out from behind the van at you?

"A Not at me.

"Q Okay. Where did those persons go?

"A They went after the man that was beaten."

The words "they went after the man that was beaten," standing alone, do not refute Mr. Titus' answer to the query, "There was one individual who during all of the struggle of (or) whatever altercation you observed, you saw committing no violence, is that correct…" and his answer, "that's right," with reference to petitioner-appellant.

That answer is consistent with his testimony

throughout…There are no facts stated at any time sufficient to give rise to an inference of culpability on the part of Mr. Mustin.

In petitioner-appellant's reply brief to respondent-appellee's answer to petition for writ of habeas corpus, (R. 38: Reply by Petitioner Eugene James Mustin to Petition Response at p. 4), he argued respondent-appellee's failure to set forth or argue any reliable trial testimony in support of petitioner-appellant's guilt relative to any element of the crime of murder in the second degree, "the intent to kill, the intent to inflict great bodily harm, the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm will probable result." (See People v Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984); People v Flowers, 191 Mich App 169; 177_____NW_____1991.)

Petitioner-Appellant has been further prejudiced by the failures of the Michigan courts to fully consider the total circumstances of his case by:

1. Failing to evaluate and give proper weight to exculpatory evidence: "The blood on Mustin's shirt did not originate from him or Mr. Toureau".

2. Failing to recognize that thre was a great possibility of a confrontation between 2 or 3 black youths and 6 or 7 white youths.

3. Treating the aggressors who admitted throwing a bolt cutter at Mustin's car and chasing after it as simply victims;

4. Failing to recognize the harm resulting from the statements by the prosecutor supporting the inference that the three had vandalized cars belonging to the six white youths;

5. Creating the illusion that the white youths were innocent victims of jvicious aggressions by the 3 black youths rather than as participants in a racial altercation;

6. Conducting a trial in which all of those elements of fundamentally unfair and unconstitutional deprivation of rights of the black youths were permitted to surface.

Ineffective redaction or sanitizing of testimony failed to exclude harmful and

prejudicial testimony relative to an offense for which the petitioner-appellant was not being tried…

Magistrate Komives admits that the quesiton of sufficiency of the evidence presents a close and difficult issue to be determined by the jcourt. (R. 40: Report and Recommendation by Magistrate Judge Paul J. Komives at p. 4)

Petitioner-Appellant maintains that the trial, as conducted, presented was one in which the petitioner-appellant was inevitably and inexorably deprived of a fair trial! The conduct of the trial was inherently unfair.

II. HARMFUL ERROR WAS COMMITTED BY THE COURT IN PERMITTING THE PEOPLE (PROSECUTER) TO PREDICATE ARGUMENTS FOR CONVICTION ON ALLEGATIONS THAT THE DEFENDANTS HAD VANDALIZED AUTOMOBILES BELONGING TO THE WHITE YOUTHS WHEN THE BLACK YOUTHS WERE NOT CHARGED WITH VANDALIZING THE AUTOMOBILES.

Although a motion to suppress was filed in Mr. Mustin's behalf and the trial court ordered that no reference to the alleged vandalism of the automobiles of the six (6) white youths'

automobiles be made during the course of trial, the People consistently referred to the alleged vandalism. Objection was made to tne reference by the prosecutor to a line of questions dealing with the highly inflammatory and unfairly prejudicial subject of vandalism; the trial judge attempted to cure those references, but this writer believes that the curative instructions by the Court to the jury were totally ineffective:

He next made a reference to several cars being vandalized and intimated that the three defendants including Mr. Mustin had vandalized automobiles belonging to the witnesses and the deceased.

(See p. 29-30 of T, LL 21-24 and 1-15, respectively).

Cousel for Mr. Mustin objected to the intimation by the prosecutor that Defendants had vandalized any automobiles...He was joined by brother counsels. (See p. 32 of T, LL 3-8)

Despite an ineffective attempt by the Court to instruct the jury and to cure an incurable and highly prejudicial statement, which counsel

for the defense maintains constitutes reversible error. The trial proceeded as follows:

> "'The Court: I'm going to instruct you, ladies and gentlemen of the jury, to listen to what the Prosecuror is telling you he's going to prove. If he doesn't prove it, I'll give you instructions. You listen to what he's saying. That's the first I've heard of this. I have great respect for Mr. Dardy's statements, and hopefully - well, I don't want to say anything else as to what he's doing or what he's going to prove.' (p 32 of T 9-18) [R. 14 thru R. 28; State Court Transcripts of Jury Trial Procedings at PP 3 and 4]

Mr. Dardy continued his highly inflammatory and unfairly prejudicial line, which Defendant maintains contains incurable inferences:

> "'…Proceed Mr. Dardy.
>
> ".Mr. Dardy: Ladies and gentlemen, I will tell you right now, we're not attempting to prove that these Defendants are guilty of vandalism, but that they are guilty of the offense of second degree murder. However, the evidence in this case suggests very strongly that they were committing vandalism of these vehicles, but we're not charging them with that.
>
> "'Mr. Viviano: Your Honor, I will object to that remark and I'll ask the jury to disregard that remark unless he says what evidence he expects to show you that will prove that. All of the evidence that we've got is exactly the opposite and he is mak-

ing a conclusionary remark there and I object to it.

"'Mr. Dardy: I object to Mr. Viviano testifying in front of the jury in regard to the facts in this case.

"'The Court: Let's put this to rest right now. These Defendants are not charged with vandalism. Tell the jury what happened that night and do it in the light of your being concerned with what these Defendants are charged with and what the testimony will indicate that the Defendants did.

"'Now, ladies and gentlemen of the jury, he's outlining the case for you. He's indicated that these fellows stopped to play basketball and he's giving you some of the background facts and what the Prosecutor's theory of the case is. That I'm going to permit, but you are to totally disregard any remarks abour vandalizing. Can you do that or can't you?' (PP 32-33 of T, LL 19-24 and LL 1-24, respectively) [R. 14 thru R. 18: State Court Transcripts of Jury Trial Proceedings at PP 3 and 4]

It was Defendants' position that it was impossible to **'disregard any remarks about vandalizing;'** and, as a result the jury was unduly influenced by verboten statements advanced by the prosecutor!

At the conclusion of Mr. Dardy's opening

statement, counsel for Mr. Mustin, moved that the charges against Mr. Mustin be dismissed, within the context of the following dialogue. None of Mr. Dardy's offers of proofs, even if established, would support the charge that Mr. Mustin was an aider and abettor:

> "'Mr. Smith: May it please the Court, we have had the opening statement of Mr. Dardy; and in Mr. Dardy's opening statement, he was supposed to state allegendly what he expects to prove as far as the Defendants are concerened; and in his opening statement with Mr. - with reference to Mr. Mustin, his statement was that Mr. Mustin borrowed his mother's car, that he borrowed a car from his mother and that he was stopped one block from the scene of the death of Mr. Toureau with a shirt with blood on it.
>
> "'At the time of making the opening statement, he stated that there was a wound in his side and one on his hand.
> "'The purpose of the opening statement is to establish what he expects to prove, and as far as his case is concerned, thos e expectations ended after he admitted freely that there was not enough to establish that Mr. Mustin engaged in any crime, especially if we sort out the analysis of the blood type of Mr. Toureau and Mr. Mustin and compare them; and dealing with the statement and the conclusion of the laboratory scientist that the human blood analysis could not have originated from Brian Toureau

or Eugene Mustin.

"'Under the circumstances I would move that Mr. Mustin, that the charges against Mr. Mustin be dismissed.

"'Mr. Dardy: My only argument, Your Honor, would be to indicate that the prosecution intends to prove the charge of second degree murder and that Mr. Mustin was involved and was an accessory at least in the killing of the victim, and that - the things that Mr. Smith indicated are true…"

(Petitioner's Brief on Appeal, PP 6-7) [R. 14 thru R. 28: State Court Transcripts of Jury Trial Proceedings on PP 3 and 4]

If the latter statement made by prosecutor is accepted as true, the Court should have no problem with granting the petition for writ of habeas corpus.

"After selection of a jury was conlcuded on April 5, 1988, the trial judge, the Honorable Frank E. jeanette, entertained Mr. Smith's motion in limine, joined in by counsel for Mr. Houston." (See PP 4-5 of T, Lines, 17-24 and 1-17 respectively.) The motion was addressed the the exclusion of any statment or confession made by Mr. Chatman, a co-defendant, which might exculpate Mr. Chatman while inculpatin Mr. Mustin (P 5 of

T, LL 17-24) and was prediacted upon the sixth Amendment to the U.S. Constitution, upon United States v Burton, 391 US 479 and upon Due Process Clause of the Fourteenth Amedment to the U.S. constitution. (See P 2 of Petitioner's Brief in Support of Petition for Writ of Habeas Corpus, U.S. District Ct. No. 93 CV 70018 DT).

Subsequent to arguments, the Court ruled that the attorneys and Court would take up matters regarding redacted or santized versions of Mr. Chatman's statement prior to its being submitted or read to the jury.

The motion in limine was granted.

At the same time, Mr. Mustin's motion in limine was failed or contiguos thereto, petitioner-appellant filed his motion to suppress.

The trial court ordered that no reference to the alleged vandalism of the automobiles belonging to the (6) six white youths be made during the course of trial.

Despite consistent objections by counsels for the defendants, the prosecution consistently

propounded highly inflammatory and unfairly prejudicial arguments to the Court and jury strongly suggestive of the trustworthiness of false and unsupported intimations that the petitioner-appellant had been guilty of vandalizing the vehicles belonging to the white youths.

Curative instruction attempted by the Court were totally ineffective.

> "He next made a reference to several cars being vandalized and intimated that the three defendants including Mr. Mustin had vandalized automobiles belonging to the witnesses and the deceased. (P 29-30 of T, LL 21-24 and 1-15, respectively)
>
> "Council for Mr. Mustin objected to the intimidation by the prosecutor that Defendants had vandalized any automobiles...He was joined by brother counsels. (P 32 of T, LL 3-8)
>
> "Despite an inffective attempt by the court to instruct the jury and to cure an incurable and highly prejudicial statement, which counsel for the defense maintains constitutes reversible error:
>
> > "'The Court: I'm going to instruct you, ladies and gentlemen of the jury, to listen to what the Prosecutor is telling you he's going to prove. If he doesn't prove it, I'll give you instructions. You listen to what he's

saying. That's the first I've heard of this. I have great respect for Mr. Dardy's statements, and hopefully - well, I don't want to say anything else as to what he's doing or what he's not doing or what he's going to be able to prove or not be able to prove." (P 32 of T 9-18)

"Mr. Dardy continued his highly inflammatory and unfairly prejudicial line, which Defendant maintains contains incurable inferences:

> "'…Mr. Dardy: Ladies and gentlemen, I will tell you right now, we're not attempting to prove that these Defendants are guilty of vandalism, but that they are guilty of the offense of second degree murder. However, the evidence in this case suggests very strongly that they were committing vandalism of these vehicles, but we're not charging them with that.
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> "'Mr. Viviano: Your Honor, I will object to that remark and I'll ask the jury to disregard that remark unless he says what evidence he expects to show that will prove that. All of the evidence that we've got is exactly the opposite and he is making a conclusionary remark there and I object to it.
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> "'Mr. Dardy: I object to Mr. Viviano testifying in front of the jury in regard to the facts in this cases.

"'The Court: Let's put this to rest right now. These Defendants are not charged with vandalism. Thell the jury what happened that night and do it in light of your being concerned with what the testimony will indicate that the Defendants did.

"'Now, ladies and gentlement of the jury, he's outlining the case for you. He's indicated that these fellows stopped to play basketball and he's giving you some of the background facts and what the Prosecutor's theory of the case is. That I'm going to permit, but you are to totally disregard any remarks about vandalzing. Can you do that or can't you?' (PP 32-33 of T, LL 19-24 and LL 1-24, respectively)

"'It is Defendant's position that it was impossible to **'disregard any remarks about vandalizing;'** and, as a result the jury was unduly influended by verboten statements advanced by the prosecutor!" (Petitioner's Brief on Appeal, PP 4-5)

"'At the conclusion of Mr. Dardy's opening statement, counsel for Mr. Mustin moved that the charges against Mr. Mustin be dismissed, within the context of the following dialogue. None of Mr. Dardy's offers of proofs, even if established, would support the charge that Mr. Mustin was an aider and abettor:

"'Mr. Smith: May it please the Court, we have had the opening statement of

Mr. Dardy; and in Mr. Dardy's opening statement, he was supposed to state allegedly what he expects to prove as far as the Defendants are concerned; and in his opening statement with Mr. - with reference to Mr. Mustin, his statement was that Mr. Mustin borrowed his mother's car, that he borrowed a car from his moter and that he was stopped one block from the scene of the death of Mr. Toureau with a shirt with blood on it.

"'At the time of making the opening statement, he stated that there was a wound in his side and one on his hand.

"'The purpose of the opening statement is to establish what he expects to prove, and as far as his case is concerned, those expectations ended after he admitted freely that there was not enough to establish that Mr. Mustin engaged in any crime, especially if we sort out the analysis of the blood type of Mr. Toureau and Mr. Mustin and compare them; and dealing with the statement and the conclusion of the laboratory scientist that the human blood analysis could not have originated from Brian Toureau or Eugene Mustin.

"'Under the circumstances I would move that Mr. Mustin, that the charges against Mr. Mustin be dismissed.

"'Mr. Dardy: My only argument, Your Honor, would be to indicate that the prosecution intends to prove the charge of second degree murder and that Mr. Mustin

was involved and was an accessory at least in the killing of the victim, and that - the things that Mr. Smith indicated are true…" (Petitioner's Brief on Appeal, PP 6-7)

The supposed redacted statement of Mr. Chatman was read to the Court and jury while the three defendants sat with their counsels at the defendant's table from which they were introduced and identified to the Court and jury…Mr. Dardy's statement exceeded acceptable limitations as he gave testimony relative to the fear experienced by the six white youths, who testified for the People, as they "fled" from the presence of the three black defendants who had so aggressively attacked them (See P. 34 of T, LL 9-12).

He irresponsibly alleged that "Mr. Toureau was beaten to death by at least two men in such an unfair fight that it was not self defense…"that "Mr. Mustin was involved in the matter because he borrowed his mother's car…and drove it from the scene" (of Mr. Toureau's death).

The weaknesses of the People's case were totally ignored and passed over by the prosecution…i.e., the intimation that Mr. Mustin

had participated in the beating of Mr. Toureau despite the fact that the medical examiner testified clearly that blood on Mr. Mustin's shirt was that of neither Mr. Mustin nor Mr. Toureau...He also referred to and in fact intimated the three defendants, including Mr. Mustin, had vandalized automobiles belonging to the six white witnesses including the deceased...The absence of any charges against or the fact that the white youths were not charged or in any manner assessed blame by the prosecution...

Instead, they were portrayed as victims and made star witnesses for the People...no consideration was given to their aggressive behavior in throwing the bolt cutters at and chasing after petitioner-appellant's automobile without any valid reason for doing so, other than an unfounded suspicion that it's occupants had damaged vehicles belonging to the six white youths.

IV. THE INSUFFICIENCY OF EVIDENCE DUE PROCESS CLAIM BY PETITIONER IS INEXTRICABLY INTERTWINED WITH THE VIOLATION OF PETITIONER'S SIXTH

AMENDMENT RIGHT OF CONFRONTATION AND CROSS EXAMINATION AND THEREBY SHOULD NOT BE PRECLUDED FROM THE COURT'S REVIEW WHERE THE READING OF NON-TESTIFYING CO-DEFENDANT'S CONFESSION TO THE COURT AND JURY UNDERSCORED ITS HARMFULNESS DUE TO THE WEAKNESS OR ABSENCE OF OTHER INCULPATORY TESTIMONY SUFFICIENT TO CONVICT.

In People v Banks, 438 Mich 408 (1991), the Court stated:

> "The Sixth Amendment of the United States Constitution provides, in part, that '[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…' This Sixth Amendment right is applicable to the states, Douglas v Alabama, 380 US 415; 85 S. Ct 1074; 13 L Ed 2d 934 (1965), and the same right is guaranteed by Const 1963, Art 1, Section 20.
>
> "In California v Green, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2nd (1970), the United States Supreme Court explained that the Confrontation Clause
>
> > "'(1) insures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth," (3)

> permits the jury that is to decide the defendant's fate to obseve the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.'"

In People v Banks, supra, the prosecutor, as in the instant case drew a vivid picture for the jury; alleging that there were three persons in the car, Burley, funches, and the defendant...but it was the third person in the car who did the shooting...

The closing arguments of Aaron Funches' counsel was even more direct:

> "And it's important that the [the prosecutor] show you when because, for example, if his theory is that Mr. Banks - he says it was Mr. Banks, but whoever he says the shooter was - premeditated this killing, planned it, decided when he got out of the car, then he did that when he got out of the car and how do you bootstrap whatever claimed assistance my client was supposed to have provided when the premeditation occurred after he got out of the vehicle?"

The closing argument of counsel for Theodore Burley addressed the testimony of three witnesses "who saw Melvin Banks and they point him out clearly doing the shooting."

The Court closed this aspect of the case by

stating that:

> "The explicit accusations made against the defendant in these closing arguments leave no doubt that the redaction was totally ineffective in buffering the defendant from the prejudicial effects of the admitted statements. Under the circumstances, 'the risk tha the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.' Bruton, supra, p. 135.
>
> "We conclude that the cautionary instructions given by the trial court were constitutionally inadequate. The instructions failed to insure that the jury would consider the codefendants' statements in a limited fashion - as evidence against the codefendants but not the defendant. The admission of Funches' and Burley's statements into evidence deprived the present defendant of his right to confrontation."

The Banks court still with reference to Bruton continued by stating:

> "A Bruton violation does not automatically require reversal of the defendant's conviction:
>
> "'In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error. [Schneble v Florida, 405

> US 427, 430; 92 S Ct 1056; 31 L Ed 2d 340 (1972). See also Brown v United States, 411 US 223; 93 S Ct 1565; 36 L Ed 2d 284 (1969); People v Wright, 408 Mich 1, 26-27, 30; 289 NW2d 1 (1980); People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (19172).]'"

In the subject case, the facts that Mr. Chatman's out-of-court confession formed the primary basis for petitioner-appellant's conviction and played a large part in the overcoming of Mr. Titus' consistent testimony that he did not see Mr. Mustin commit any act of violence against Mr. Toureau mandate petitioner-appellant's right to cross examine Mr. Chatman, who, incidentally, did not testify during trial.

Under the facts of the case against petitioner-appellant, it is evident that he was denied his Sixth Amendment right of confronting and cross examining Mr. chatman, as was Mr. Banks. In People v Watkins, 438 Mich 627, the court analyzes and deals with carry over rule, its rejection and the Hearsay Issue in terms of MRE 802, MRE 804(b)(3):

> "MRE 802 provides that hearsay evidence is not admissible except where the rules provide otherwise. MRE 804(b)(3), worded almost identically to FRE 804(b)(3),

provides for the admission as subtantive evidence of hearsay 'statements against interest,' defined as follows:

> "'Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or propietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable person in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declatant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.'

"Michigan, unlike the Untied States and many other states, has not adopted any 'catch-all' exception to the rule against hearsay, cf. FRE 803(24); FRE 804(b)(5), and no other exception has been suggested or appears to apply to the disputed hearsay statements in this case. Thus, if those statements do not properly constitute statements against interest, their admission was erroneous."

Clearly, Mr. Titus was the only eyeball witness to the immediate incident resulting in Mr. Toureau's death…His testimony relative to petitioner-appellant was not inculpatory. (No

other witness was in a position to give direct testimony relating to those incidents.) Mr. Chatman's confession was totally that of a codefendant and pursuant to the analysis set forth in People v Watkins, supra., and their admission was erroneous.

It was error to admit out-of-court confession against petitioner-appellant; it was not harmless error but was harmful beyond reasonable doubt...None of the state's witnesses were able to testify to any assistance or encouragement given by petitioner-appellant to those engaged in or participating in the beating death of Mr. Toureau.

In the case of Williams v Mithrow, [944 F2d 284 (6th Cir. 1991j)], a similar case in that no lawful confession had been admitted, the Court held:

> "'There were no lawful confessions admitted in this case. Moreover, the other evidence against petitioner at trial, while substatial, was not massive or overwhelming. No witness was able to identigy petitioner as being present at the scene of the murders. Petitioner was linked by testimony to the murder weapon and to the victims. If, arguendo, harmless error analysis did apply

to the admission of petitioner's inculpatory statements, this court could not find that admission of those statements was 'harmless error beyond a reasonable doubt.' Chapman v California, 386 U.S. 18, 24, 87 S. Ct. 824, 838, 17 L Ed 2d 705 (1967)."

There was insufficient evidence to sustain a conviction of petitioner-appelant:

"The concept of sufficiency, on the other hand, is designed to determine whether all the evidence, considered as whole, justifies submitting the case to the trier of fact or requires a judgement as a matter of law. This is in contrast to the standards for relevancy which usually focus on one particular piece of evidence. The fact that some evidence is introduced does not necessarily mean that the evidence be sufficient to support a conviction to be admissible, it does not necessarily follow that merely because some evidence is admitted, the evidence is sufficient to raide a jury issue. In quantative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonbable doubt.

"Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant can be convicted of a criminal offense, see, Jackson, supra. If sufficient evidence is

not introduced, a directed verdict or judgement of acquittal should be entered...

"In summary, the trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, Garcia, supra, view that evidence in a light most favorable to the prosecution. People v Vail, 393 Mich 460, 463; 227 NW2d 535 (1975), and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, Jackson, supra, p. 319." People v Hampton, 407 Mich 354.

There is an apparent parallel in the instant cause and that of Hopson v Foltz, cited Weaver v Foltz, 88 F. 2d 1097 (6th Cir, 1989), and the constitutional standards cited in People v Hampton, supra, as necessary to conviction of a criminal offense parallels those required for issuance of a writ of habeas corpus:

"Our account of the facts and evidence against Hopson in Hopson v Foltz [818 F 2d 866 (Table)] (6th Cir. 1987), and the facts and evidence as presented in the Michigan Court of Appeals in Weaver's case appear to be identical. Interpreting the decisions of Michigan courts and of this Circuit, we held that Hopson's 'passive acquiescence' without 'some conscious action to make the criminal venture succeed' fell short of the threshold conduct required of an aider and abettor of first-dgree murder. Hopson,

slip op. at 3.

Likewise, as supported by the evidence in the instant case, the absence of proofs as to some "conscious action" on part of the petitioner to "make the criminal venture (second degree murder) succeed" negates a finding of petitioner aiding and abetting the second degree murder beyond a reasonable doubt.

Certainly, one is notable to enter the minds of the jury and it is due to one's inability to do so, that in the context of the instant case of largely unsubstantiated evidence, this very Sixth Amendment violation might have been the very thing that tipped the balance in favor of conviction. Thus, it is the petitioner's contention that contrary to responsent's position and the Court's agreement; the Sixth Amendment violation in the instant case should not be severed when it so inextricably connected to the insufficiency of evidence claim.

V. ARGUENDO, IF THE FACTUAL COMPONENTS FORMING THE BASIS FOR PETITIONER'S CONVICTION AS AN AIDER OR ABETTOR TO SECOND DEGREE MURDER IS FOUND TO BE NON-EXISTENT OR ERRONEOUS, THEN, THE

CONVICTION OF PETITIONER AS AN AIDER OR ABETTOR TO THE SECOND DEGREE MURDER MUST FAIL ON THE BASIS OF INSUFFICIENT EVIDENCE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In Jackson v Virginia, 443 US 307; 99 S Ct 4781; 61 Led2d 560 (1979), the Supreme court held that an individual's state court conviction on insufficient evidence violates the due process clause of the Fourteenth Amendment. Further, the court in Jackson v Virginia supra, set forth the standard of review when considering insufficiency of evidence as follows.

> "Whether, after reviewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id, at 319, 99 Sct at 1789.

Under the above standard, "a writ of habeas corpus must issue to any habeas petitioner whose conviction falls short of this standard." Jackson v Virginia, supra at 317-18; 99 Sct at 1788. Accord Brown v Davis 752 F2d 1142 (6th Cir. 1985); Fuller v Anderson, 662 F2d 420 (6th Cir. 1981), cert. den 455 US 1028 (1982).

The second degree murder statute, MCL

750.317; MSA 28.549, reads as follows:

> All other kinds of murder shall be murder of the second degree and shall be punished by imprisonment in the state prison for life, or any term of years in the discretion of the Court trying the same.

Based on the facts of the instant case, the petitioner was convicted as an aider and abettor of a second degree murder. Accourdingly, the statute found at MCL 767.39; MSA 28.979 abolished the distinction between a principal and an accessory by providing in pertinent part:

> Every person concerned in the commission of an of offense, whether he directly commits the act constituting the offense or procutes, counsels, aids or abets in its commission may hereafter be prosecuted, indicted, tried, and a <u>conviction shall be punished as if he had directly committed such offense</u>. See .eg. <u>People</u> v <u>Bargy</u>, 71 Mich App 609; 248 NW2d 636 (1976); <u>People</u> v <u>Mann</u>, 395 Mich 472; 236 NW2d 509 (1975); <u>People</u> v <u>Gould</u>, 384 Mich 71; 179 NW2d 617 (1970).

Stated another way, one who aids and abets the commission of a crime is chargeable as a principal. The "Aider and abettor" is one who encourages, counsels or assists another in the commission of a crime <u>with the intention of rendering such help and with the knowledge that</u>

the criminal act is contemplated; each accomplice is equally liable for the actions of the others when operating in concert. People v Spry, 74 Mich App 584; 454 NW2d 782 (1977).

The Michigan Supreme Court in People v Palmer, 392 Mich 370, 378; _____NW2d (1974) observed:

In criminal law the phrase "aiding and abetting" is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in pre-concert with the principal for the purpose of rendering assistance, if necessary. 22 CJS, Criminal Law 88(2), p 261. The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime. (citation omitted).

The foregone cited material poses two sub-issues or arguments when the law is applied to the instant facts. They are as follows:

A. The conviction of the petitioner for second degree murder as an aider and abettor must be reversed where one or more of the predicating factors expressed in the Michigan Court of Appeals opinion upholding the aider or abettor conviction is non-existent upon the record.

In the Michigan Court of Appeals opinion upholding the petitioner's conviction for aiding and abetting (People v Mustin, et al. Michigan Court of Appeals File No. 116199/118929/120544) the panel alludes to and erroneously attributes to the testimony of the sole eyewitness Titus as indicating specifically,…Mustin (the petitioner) and Chatman chased and eventually brought down the victim", p.1. Again, in the panel's analysis leading to its determination that the petitioner Mustin did indeed aid and abet in the murder, the panel acknowledged that the testimony of Titus, the sole eye witness to the murder, affirmed the fact that the petitioner did not participate in the beating, but the panel proceeded to reiterate that the "chasing down and capturing the victim with Chatman" was the factual component establishing the petitioner's act of assistance. Ct. of Appeals opinion, p. 2.

yet, a painstaking search of the testimony of Titus, the sole eyewitness to the murder, does not bear out in the evidentiary record at trial or at the preliminary examination that

the petitioner chased down and captured the victim with Chatman. (See Vol. I and II of the preliminary examination transcript continuing the testimony of Mr. Titus found therein. There is no evidence to support the appellate court's conclusive factual determination. The same result obtains when one reads all of the testimony given by Mr. Titus during trial of the subject case in the Macomb County Circuit Court.

An additional factual component that lacks evidentiary report relative to the petitioner Mustin was the appeals panel insertion "that the jury could have easily inferred from the evidence that Mustin and his colleagues were sparring for a fight from early on."

The query that is raised by each of the above foreign ingrafted factual components as adopted by the appeals court as conclusive is where is the basic factual premise or established fact upon which these conclusions stand. While a reasonable inference may be drawn from and established fact, inferences cannot be built upon inferences, People v Atley, 192 Mich 298,

314-315; 220 NW2d 465 (1974). The pyramiding of inferences is impermissible because it deprives a defendant of the right to be proven guilty beyond a reasonable doubt. People v McGregor, 45 Mich App 397; 206 NW2d 218 (1973).

Instructivly, the underlying theory of the cases that use the no inference on an inference terminology is well and accurately stated in People v Helcher, 14 Mich App 386, 390; 165 NW2d 669 (1966), which cites an often quoted Indiana case as follows:

> "What is actually meant by the statement found in many cases, that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility. Shutt v State, 233 IND 169; 118 NE2d 392 (1954) quoted approvingly in People v Eaves, 4 Mich App 457; 145 NW2d 260 (1966).

How conjectural or speculative can a "conclusion of fact" be when like in the instant case a scruitinizing respective look from which the conclusion proceeds are found to be non-existent would not necessarily follow simply because the eye witness allegedly testified that he saw the petitioner run in the direction of

the now deceased that he "caught" the deceased and held him for the purpose of the other two co-defendants to kill him.

Furthermore, even if we would adopt the extremist of scenarios and the ultimate outcome of the petitioner having "caught" the deceased for the purpose of spoiling for a fight" as the court of appeals expressed. It certainly should not be infered even from a spoiling to engage in a fight that the petitioner possessed the mens rea or intent to assist in a killing.

Under the ingrafted factual component, the Court of Appeals proceeded to infer that the peritioner was possessed of the requisite intent to aid and abet the second degree murder. Thus the implication that the Court of Appeals inferred the intent possessed by the petitioner as that of one of three possible intents necessary to convict for second degree murder; they are: the intent to kill, the intent to inflict great bodily harm with the knowldege that death or great bodily harm will probably result. People v Dykehouse, 418 Mich 488, 495; 345 NW2d 150

(1984).

Notably, the Michigan Supreme Court in People v Quigley, 217 Mich 213, 217-218; 185 NW 787 (1921) characterized "intent as a secret of the defendant's mind which he can disclose by his declarations or by his actions and his actions sometimes speak louder than words". Based on the observations of the eyewitness to the murder, the actions of the petitioner neither directly or inferentially support a finding of the petitioner possessing the requisite intent necessary to support.

The above result is correct especially when one is forced to carefully check the record of the eye-witness testimony in the instant case. One is startled by the clear absence of evidence so necessary to support non-supported conclusions. In this regard, the reviewing court evidently assumed that the factual components based on an erroneous or non-existent facts, the conviction of the defendant must be reversed due to their glaring deficiency in proofs.

B. Presupposing a finding of insufficiency to support the conviction of petitioner for aiding and abetting the second degree murder the defendant must be discharged because of double jeopardy implications.

The presupposition expressed here assumes a finding by this court that the evidence as proffered by the prosecution was insufficient to sustain the charges. United States Supteme Court precedent have establishd that the retrial of a defendant whose conviction has been reversed for insufficiency of evidence would violate the double jeopardy clause which si fully applicable to state criminal proceedings. See e.g. Burks v United States, 437 US 2141; 98 Sct 2141; 57 Led2d 1 (1978); Green v Massey, 437 US _____98 Sct 2151; 57 Led2d 15 (1978)

VI. THE REDACTED CONFESSION OR STATEMENT OF THE NON-TESTIFYING DEFENDANT VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND CROSS-EXAMINATION REQUIRES REVERSAL OF HIS CONVICTION WHERE IT WAS OBVIOUS THAT SUCH ERROR WAS NOT HARMLESS WHEN SUCH READING OF REDACTED STATEMENT BEFORE THE JURY OBVIOUSLY POINTED TO THE PETITIONER

AND OTHER CO-DEFENDANT WHO SAT AT THE DEFENDANT'S TABLE WITH THE CONFESSING CO-DEFENDANT.

The introduction of a redacted confession may still violate the Bruton rule if the statement compels a directly inculpating inference. United States v Garritt, 727 F2d 1003, 10013-14 (11th Cir. 1984). See e.g. United States v Satterfield, 743 F2d 827, 849 (11th Cir. 1984). United States v Hicks, 524 F2d 1001, 1003 (5th Cir. 1975); English v United States, 620 F2d 150, 152-153 (7th Cir. 1980).

Under the facts of the instant case, the evidence upon which the governement depended to establish an evidentiary weak case against the petitioner as an aider and abettor was the confession of one of the co-defendants. It served to buttress a weak case relative to the petitioner as evidenced from the testimony of the sole eyewitness to the murder (Mr. Titus). Thus, based on petitioner's insufficiency of evidence rationale owing to its inextricable connection to the admitted but redacted confession, the government's utilization of such confession was

vitally important case and as a consequence created a constitutional violation. See e.g. United States v Key, 725 F2d 1123, 1126 (7th Cir. 1984); English v United States, supra.

Here as noted, constitutional violation under the sixth Amendment could not be deemed harmless when inspite of the redacted confession or statements, the absence thereof would not have compelled the jury to think other than that the redacted portions of the co-defendant's statement reffered to petitioner and other co-defendant's statement referred to petitioner and other co-defendant, especially when they sat with the confessing co-defendant at the defense table during the reading to the jury.

CONCLUSION

This petition for certiorari should be granted.

Respectfully submitted,

Eddie D. Smith, P20645
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CONSTITUTIONAL AND STATUTES INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdication thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportined among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitnats of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebbellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-

thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

EUGENE JAMES MUSTIN,

Petitioner,

v.

PAMELA WITHROW,
Respondent
_____/

CERTIFICATE OF SERVICE

I, Eddie D. Smith, a member of the Bar of the Supreme Court of the United States and counsel of record for Eugene James Mustin, Petitioner-Appellant, herein, hereby certify that, pursuant to rule 33, Rules of the Supreme Court, I served three copies of Petition for Writ of Certiorari on each of the parties herein, as follows: ARTHUR E. D'HONDT, Assistant Attorney General, at his address at the Office of Attorney General, Habeas Corpus Division, P.O. Box 30212, Lansing, Michigan 48909, by placing same in an envelope so addressed to him and depositing said envelope in a United States mail receptacle with first-class postage fully prepaid thereon.

All parties required to be served have been served.

EDDIE D. SMITH (P20645)
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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 93-2443

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EUGENE JAMES MUSTIN,
Petitioner-Appelant,
v.
PAMELA WITHROW, Warden,
Respondent-Appellee.

BEFORE: NELSON, NORRIS and DAUGHTREY, Circuit Judges

PER CURIAM. The petitioner, Eugene Mustin, appeals from the district court's judgement denying his petition for issuance of a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254. In his petition, Mustin raised only one issue, challenging the legal sufficiency of the evidence used to convict him[1]. We have reviewed the record and find no basis on which to disturb the district court's judgement. We therefore affirm.

Mustin is an inmate in a Michigan prison,

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[1]In a reply brief filed in district court and in his brief on appeal, the petitioner attempted to raise two additional issues. We conclude that they are not properly before us for review.

where he is serving a sentence of 20-60 years, following his conviction in state court on a charge of aiding and abetting the second degree murder of a man named Brian Toureau. At core, Mustin's argument is that he was merely present at the scene of the murder, and that his two co-defendants were guilty of beating Toureau to death, while he, Mustin, stood by.

The petitioner raised this same issue on direct appeal in state court. In affirming his conviction, the Michigan Court of Appeals summarized the evidence at trial and found that "[t]he evidence established more than Mustin's 'mere presence' at the murder scene." Specifically, the state appeals court found that "Mustin and his colleagues were spoiling for a fight early on…[and that] Mustin performed an act that assisted in the commission of the offense - chasing down and capturing the victim with [his co-defendant] Chatman, thereby allowing Chatman and [his other co-defendant] Houston to kill the victim." People v. Mustin, et al., Michigan Court of Appeals No. 116199 (June 4,

1992).

Reviewing the evidence independently, as the result of Mustin's § 2254 petition, the magistrate judge made a similar finding of fact and came to the same conclusion - that, in the words of an eyewitness to the murder, Mustin and Chatman "went after the man that was beaten," trapping Toureau near a fence, where Chatman and Houston beat him to death as Mustin looked on. The magistrate judge's report was adopted by the district court in its entirety. Based on our review of the record, we likewise conclude that the magistrate judge accurately assessed the evidence and correctly applied the relevant principles of law. We threfore hold that the district court's judgement denying relief on the basis of the magistrate judge's report should be AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGENE JAMES MUSTIN,
Petitioner,

v. Civil No. 93-70018

PAMELA WITHROW,
Respondent.
_____/

ORDER

This is a 28 U.S.C. § 2254 case. Petitioner is challenging his conviction for second degree murder in the Macomb County Circuit Court. A magistrate judge in a comprehensive report recommends that the petition be denied. Petitioner objects. Respondent has replied. No useful purpose would be served by a discussion of the objections and response. Suffice to say the petition raises a sufficiency of the evidence issue. The magistrate judge's Report And Recommendation discusses the evidence and the inference which the jury could reasonably draw regarding petitioner's intent. The Court adopts the Report And Recommedation as the findings and conclusions

of the Court. The petition is DENIED

SO ORDERED

/s/_____
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: October 28, 1993
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGUENE JAMES MUSTIN,

Petitioner

-vs- Civil No. 93-70018

PAMELA WITHROW,

Respondent.
_____/

JUDGEMENT OF DISMISSAL

For reasons stated in the Court's Order entered and filed this date, the petition for writ of habeas corpus is DENIED and the above case is DISMISSED.

JOHN P. MAYER
CLERK OF THE COURT

By: /s/_____
Deputy Clerk

Dated at Detroit, Michigan
this 28th day of October, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGENE JAMES MUSTIN,

Petitioner,

V. Civil No. 93-70018

PAMELIA WITHROW,

Respondent.

_____/

ORDER DENYING MOTION FOR RECONSIDERATION

On October 28, 1993 the Court entered a judgment dismissing this 28 U.S.C. SS2254 case for reasons stated in an order of the same date. Petitioner has moved for reconsideration. LR7.1(h)(3) reads:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable

> defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Nothing in the motion papers supports the view that the Court erred in adopting the magistrate judge's analysis of the evidence at trial and the inference which reasonable jurors could draw from it. As stated in the RESPONDENTIS REPLY TO PETITIONERIS OBJECTIONS TO THE MAGISTRATES (sic) REPORT AND RECOMMENDATION, p. 5:

> A rational jury could infer that Petitioner assisted the co-defendant in catching Mr. Toureau knowing that the intent of co-defendant was to assault and cause great bodily harm to him.

The motion for rehearing is DENIED.

SO ORDERED.

/s/_____
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: January 7, 1994
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGENE JAMES MUSTIN,

Petitioner,

V. Case No. 93-cX-70018-DT
JUDGE AVERN BOHN

PAMELA WITHROW,

Respondent.

REPORT AND RECOMMENDATION

I. RECOMMENDATION:

The Court should deny the petition for a writ of habeas corpus.

II. REPORT:

A.

Petitioner, who is represented by his state court counsel, seeks federal habeas corpus review of his conviction for second degree murder which resulted in a sentence of forty years incarceration. The petition and the brief in support of it appear to raise the single issue of the constitutional sufficiency of the evidence, i.e. , whether a rational trier of the fact

could have found that the essential elements of the crime were proven beyond a reasonable doubt.[1] Petitioner's brief, pp. 15 - 20; see Jackson v. Virginia, 443 U.S. 307 (1979). The Attorney General concedes that this issue was presented to both the Michigan court of Appeals and to the Michigan Supreme Court and is therefore "exhausted" for habeas purposes.

B.

The Michigan Court of Appeals affirmed the conviction in a written opinion, rejecting the claim of insufficient evidence which petitioner's counsel put forward. That portion of the opinion dealing with petitioner's appeal is as follows:

> In this consolidated appeal, the three defendants were convicted in a joint trial before a jury of seconddegree murder, MCL 750.317; MSA 28.549. Defendant Houston was also convicted of assault with intent to do great bodily harm, MCL 750.83; MSA 28.278. All three now appeal as of right, raising a host of issues. We affirm.
>
> At approximately 2:30 a.m. on September 4, 1988, the victim and five male friends were playing basketball at a park. Before they began to play, they noticed defendants' blue Ford automobile drive past. About an hour later, they discovered that their

automobiles had been vandalized and at least two members of the group saw defendants' Ford leaving the scene. When defendants' Ford returned, the victim and his friends armed themselves with tools from their vehicles' trunks, and one person struck defendants' Ford with a pair of bolt cutters as it drove past. endants circled the block, parked and turned out the Ford's headlights, then got out of the car. All of the basketball players except the victim fled to a nearby drugstore where one of them telephoned the police.

After his companions fled, the victim met a man on a bicycle named Titus and told him what had happened. When the players and the police returned to the scene, they discovered that Titus had been beaten and was incoherent. At the same time, defendants reappeared at the scene in a different automobile and, upon being identified by the players, fled on foot with the police and at least one of the players in pursuit. Defendants were apprehended shortly thereafter. The victim was found a short distance from Titus and soon died. The victim had been beaten to death with a chain.

Titus testified at trial that he had heard a cry for help and had pedaled toward the players I vehicles. When Titus reached the automobiles, the defendants stepped out from behind the automobiles and defendant Houston began to strike Titus in the face with his f ist. At the same time, Mustin and Chatman chased and eventually brought down the victim. Houston took a bicycle

chain and lock from Titus after striking him four to six times, then walked over to Mustin, Chatman, and the victim. Titus observed Houston and Chatman begin to beat the victim with the chain. After Houston arrived, Mustin did not take part in the beating, but stood by and watched.

We will consider each of the defendants' appellate arguments separately.

No. 116199 (Mustin)

Mustin raises three issues on appeal. Mustin first claims that the trial court erred when it failed to grant his motion to dismiss, brought at the close of the prosecutor's opening statement. we disagree. Such dismissals are discouraged, particularly where a jury has been called. People v. Recorder's Court Judge, 78 Mich App 576, 579; 261 NW2d 8 (1977), lv den 402 Mich 879 (1978) . The prosecutor I s opening statement set f orth the theory that Mustin had aided and abetted in the murder. The trial court did not abuse its discretion. Id.

Mustin next claims generally that the trial judge was biased against him. Defendant appears to equate the trial judge' s denial of his motion for a directed verdict with bias and argues that "[]he reasons advanced by the court for not granting Defendant's Motion and permitting the case against Mr. Mustin to go to the jury indicate how completely the court accepted the innuendos and assumption of the f acts advanced by the prosecutor ...." Our review

of the record shows that the trial judge did no more than apply the proper test for deciding a motion for a directed verdict. People v. Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980). Because defendant cites no other instances of alleged bias and never moved to disqualify the trial judge, we decline from (sic) further review of this issue.

Finally, although the issue is not clearly argued, Mustin implies that the trial court erred as a matter of law when it denied his motion f or a directed verdict. In reviewing the trial court's denial of defendant's motion, we will examine the evidence presented during the prosecutor's case, view that evidence in a light most favorable to the prosecutor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. People v. Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980); People v. Coddington, 188 Mich App 584, 599; 470 NW2d 478 (1991).

A person who procures, counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense. MCL 767.39; MSA 28.979. The phrase "aiding and abetting" describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which may support, encourage or incite the commission of a crime. People v. Palmer, 392 Mich 370, 378; 220 NW2d 393 (1984) ; People v. Vicuna, 141 Mich App 486, 495; 367 NW2d 887 (1985).

A defendant would be guilty of aiding and abetting a crime upon proof that (1) the substantive criminal offense was committed by the defendant or by another, (2) the defendant performed acts or gave encouragement which aided or assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. People v. Rockwell, 188 Mich App 405, 411; 470 NW2d 673 (1991); People v. Beard, 171 Mich App 538, 541-542; 431 NW2d (1988). Mere presence, even with knowledge than an offense is about to be committed, is not enough to make one an aider or abettor. Vicuna, supra.

Mustin was tried for aiding or abetting second-degree murder. Second-degree murder is committed if the actor entertains one of the three possible intents: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm will probably result. People V. Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984) ; People v. Flowers, 191 Mich App 169, 176; ___ NW2d ___ (1991). Intent is a question of fact to be inferred from the circumstances by the trier of fact. Flowers, supra, at 178.

Our review of the record shows that the jury could have easily inferred from the evidence that Mustin and his colleagues were spoiling for a fight from early on. The evidence established more than Mustin's

"mere presence" at the murder scene. Mustin performed an act that assisted in the commission of the offense – chasing down and capturing the victim with Chatman, thereby allowing Chatman and Houston to kill the victim. This act was performed after Houston assaulted Titus in Mustin's presence. When the prosecutor's evidence is viewed as a whole, the trier of fact could have reasonably concluded either (1) that Mustin aided the commission of the offense and that Mustin himself intended that great bodily harm be inf licted on the victim, one of the three intents that will support a conviction of second-degree murder, or (2) that Mustin knew at the time he aided the offense that Chatman and Houston intended to inflict great bodily harm on the victim. The trial court properly denied Mustin's motion for a directed verdict.

C.

1. The Court of Appeals based its legal conclusion that the evidence was sufficient for a jury to find petitioner guilty of second-decree murder on the testimony of Jason Titus. The Court concluded that Titus "testified that [petitioner] did not participate in the beating, but only chased the victim down with the help of [co-defendant] Chatman." While petitioner only "stood by as [co-defendants] Houston and Chatman beat the victim to death" this was sufficient to

find petitioner guilty of second-decree murder on an aiding and abetting theory. This basis for the Court's conclusion is mentioned a second time, when the Court commented that the evidence established more than mere presence at the murder scene. Petitioner "performed an act that assisted in the commission of the offense – chasing down and capturing the victim with Chatman, thereby allowing Chatman and Houston to kill the victim."

2. Petitioner's counsel vehemently argues that the record contains no support for the factual assertion in the opinion that his client "chased the victim down" together with co-defendant Chatman. Unfortunately for petitioner, however, there is one line in the testimony of the witness Titus, near the end of protracted direct, cross, redirect and recross examination, which could establish this vital fact. This witness' testimony appears in two volumes, the first marked item # 23 on this court's docket, and the second as item # 24. In this latter volume, the following cross-examination, first by petitioner's counsel and then by co-defendant

Houston's counsel, is recorded, beginning at line 3 on page 40 and continuing through line 12 on page 42:

RECROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Titus, you testified that there was one individual who during all of the struggle of whatever altercations you observed, you saw committing no violence, is that correct?

A That's right.

Q And that's the person?

A Right.

Q And that's testimony that you gave to us, is that correct?

A Right.

MR. SMITH: No further questions, your Honor.

RECROSS-EXAMINATION

BY MR. VIVIANO:

Q Mr. Titus, you've indicated that, and you pointed to Harry Houston as the person who attacked you, is that correct?

A That is correct.

Q And now I take it that at some other time you indicated that Mr. Mustin just stood there, is that correct?

A Standing in that general area, right.

Q Okay. Now, did you see Mr. Mustin's face or just a shadow or figure?

A Well, someone matching his description.

Q Okay. Someone matching his description. So then any person who would match his description you would identify, is that correct, whatever his name would have been if he was sitting at that table?

A Apparently.

Q And isn't it a fact that that's why you identified him the last time you were in court because he was sitting at that table or a table like this?

A Well he – he fits his own description.

Q Now, Mr. Titus, I'm going to ask you, when

you were riding your bike down here and you said a man ran out from behind the van, who you now are identifying as Mr. Houston?

A No, in front of.

Q In front of the van, who you are now identifying as Mr. Houston, was there just one man there, two or three or four or more, or how many did you see? Just Mr. Houston?

A Could you please bring me the photograph, I think I can explain it better that way.

Q Do you understand the English language?

A I do.

Q Listen to my question. When you saw the person you claim as Mr. Houston run in front of the van out into the street at you, correct, was he alone or was there other people with him?

A There were other people with him.

Q Was there one person or two or three?

A Two others.

Q Two others. Did they also run out from behind the van at you?

A Not at me.

Q Okay. Where did those persons go?

A They went after the man that was beaten.

D.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 497 U.S. 358, 364 (1970); see Warner v. Zent, 997 F.2d 116, 133 (6th Cir. 1993). When reviewing claims of insufficient evidence, a federal habeas court must ask whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990), cert. denied __ U.S.__, 111 S.Ct. 2038 (1991). This standard applies to bench trials and to state court rulings on motions for a directed verdict of acquittal. United States

v. Bashaw, 982 F.2d 168, 171 (6th Cir. 1992); People v. Hampton, 407 Mich. 354, 368 (1979), cert. denied sub nom Michigan v. Hampton, 449 U.S. 885 (1980).

The trier of fact has responsibility for resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from the acts. Jackson v. Virginia, 443 U.S. at 319. Reviewing courts must resolve conflicting inferences from the record in favor of the prosecution. Neal v. Morris, 972 F.2d 675, 678 (6th Cir. 1992). The Court must give circumstantial evidence the same weight as direct evidence when determining the suf f iciency of evidence. United States v. Farley, Nos. 92-3538/3539/3541, slip op. at 6 (6th Cir. August 6, 1993). "Moreover, a reviewing court may conclude [that] a conviction is supported by sufficient evidence even though the circumstantial evidence does not 'remove every reasonable hypothesis except that of guilty." United States v. Clark, 928 F.2d 733, 736 (6th Cir.) (quoting United States v. Stone, 748 F.2d

361, 363 (6th Cir. 1984)), cert. denied, __ U.S. __, 112 S.Ct. 144 (1991) and cert. denied, __ U.S. __, 112 S. Ct. 240 (1991); see Neal v. Morris, 972 F.2d at 677-678 (opining that "[t]he state need not rule out every hypothesis of guilt beyond a reasonable doubt, and the reviewing court need not be convinc ed of petitioner Is guilt beyond a reasonable doubt.") (citation omitted).

E.

This case was not presented to the jury on the theory that petitioner was guilty as an aider and abettor because he helped chase down and capture the victim. This is made clear both in the closing arguments of counsel and the trial judge's instructions to the jury. The prosecutor's closing and rebuttal arguments are attached to this report. The prosecutor laid emphasis on the action of petitioner in driving the co-defendants to and from the scene. He did not argue to the jury that petitioner had helped chase down and capture the victim. The trial judge told the jury that, to establish second

degree murder, the prosecution had to prove beyond a reasonable doubt that the victim died, and that his death was caused by the defendants, that is, that the victim died as a result of a blow to the head. He then stated the following:

> – for second degree murder you must find that each of the defendants acted with a certain state of mind in causing the death. You must find that each defendant had one of the following states of mind at the time of the killing:
>
> That each defendant intended to kill Brian Toureau, or that each defendant intended to do great bodily harm to Brian Toureau, or that each defendant intended to create a very high risk of death or great bodily harm with knowledge of death or great bodily harm was proper result of his act.
>
> It is charged in this case that the defendants either directly committed the crime charged, murder second degree, or they intentionally aided or assisted another in the commission of that crime.
>
> All persons who aided or assisted in the commission of a crime are as liable as if they had directly committed the crime, and may be convicted of the principle offense as an aider and abettor.

Following a brief interruption, the trial

judge returned to the subject of aiding and abetting, stating the following:

> It is charged in this case, that the defendants either directly committed the crime charged, murder in the second degree, or they intentionally aided or assisted another in the commission of that crime.
>
> All persons who aid or assist in a commission of a crime are as liable as if they had directly committed that crime and may be convicted of the principle offense or as an aider and abettor.
>
> Before you may convict, you must be convinced of the following beyond a reasonable doubt:
>
> And first, that the crime charged must have been committed either by the defendant or some other person.
>
> Second, the defendant must have performed acts or given encouragement which aided or assisted the commission of that crime either before or at the commission of the crime.
>
> Third, the defendant must have intended the commission of the crime charged, or have known that other persons intended its commission at the time of giving the aid or encouragement.
>
> Mere presence, even with knowledge that

an offense is planned, or is being committed, is insufficient to establish that any of the defendants aided or assisted in the commission of that crime.

Later, the trial judge stated the theory of the prosecution:

> It is the People's theory in this case that on Saturday, September 4, 1988, a group of young men went to a bachelor party. Later, on Sunday morning, they went to play basketball at Macomb Gardens park in the City of Roseville. After their car alarms sounded, they discovered their vehicles had been vandalized. One of them had seen a blue Taurus, in the area. When the blue Taurus returned, James Paluzze threw a pair of bolt cutters at the car as it made a slow pass. The car was driven by defendant Mustin, and occupied by def endants Houston and Chatman. All of the youths then ran to call the police at the nearby Perry Drug Store except Brian Toureau who stayed behind to protect the cars. The defendants returned and attacked both Toureau and James Titus, an innocent passenger on a ten-speed bicycle. Houston and Chatman beat the victim to death with a bicycle chain and bumper jack while Mustin watched. All three fled the scene but returned riding on the hood of a red Daytona, driven by Michael Kain, and they scattered when they saw the police. The defendants are guilty of the charge of second degree murder for the brutal slaying of Brian Toureau, and Harry Houston is guilty of assault with intent to murder Jason Titus. Since the defendants could have easily avoided the killing, there is no valid claim

of self-defense available to the defendants. Petitioner's theory was given as follows:

> Mustin's theory of the case is that he drove his mother's automobile with their [sic] consent and to a place where he had a right to be. In no sense is he guilty of committing second degree murder or manslaughter. There is no evidence that he participated in the commission of a crime, least is there any evidence that he is guilty of aiding and abetting any person in committing murder or manslaughter by aiding or abetting in a commission of a crime by any causal act or acts leading to the defense (sic] of the deceased.
>
> It is defendant Mustin's theory that he is not guilty of committing any crime, second degree murder or manslaughter.

F.

Under the instructions, petitioner could be found guilty if he were found to have shared in an intent to inflict great bodily harm, and somehow assisted in the perpetration of the assault which caused death. The jury could conclude that, after petitioner's car was damaged by the action of the deceased or of his companions in throwing a bolt cutter at it, the three defendants resolved to retaliate and to inflict great bodily harm, and that petitioner drove

the car back to the scene with this in mind. The jury could also have found that it was petitioner's car that had been damaged, that he observed the beating of Titus (an innocent bystander) by Houston, and that he ran after the victim with Chatman. There was blood on petitioner's clothes which was not his or the deceased victim, suggesting his involvement in a bloody fight with someone else. while the act of driving away his two co-defendants might only prove, standing alone, that petitioner was guilty of being an accessory after the fact rather than murder, when taken in conjunction with the other evidence, it adds to the calculus of the sufficiency of the evidence. This Court may well have reached a result contrary to that of the state court jury. That, however, is not the test on habeas review. Neal v. Morris, supra, 972 F.2d at 678.

G.

In its review of this close and difficult issue, the Court may wish to compare this case, with several others that limited independent

research has uncovered.

1. The Sixth Circuit reviewed on separate occasions the granting of the writ by a district judge to both defendants convicted of murder in an Ohio court. Speigner v. Jago, 603 F.2d 1207 (6th Cir. 1979), cert. denied, 444 U.S. 1076 (1980); Scott v. Perini, 552 F.2d 428 (6th Cir. 1981), cert. denied, 456 U.S. 909 (1982). The Sixth Circuit upheld the discharge of Speigner from prison. He and Scott had both been convicted of the murder of a William Bell, whose body was found, badly beaten, at 7:00 a.m. on the morning of June 26, 1973 in a street in Cleveland, Ohio Bell had been killed by two shots, a .32 caliber pistol shot from the front and a shotgun blast from the back. Speigner and Scott had been stopped for a routine safety inspection by police just after 5:00 a.m. the same morning, two hours before the discovery of Bell's body. They were in Bell's car, Scott driving. Speigner gave police his name as Frank Mathews, the name on a welfare card he exhibited to the officer. Scott told the officer they had rented the car for

$15.00 from the owner. He was held by police until he could post a $50.00 bond for the safety violation. Speigner was released, but said he would return to post his friend's bond. He did not, but fled the jurisdiction, traveling to San Francisco, Las Vegas, St. Louis and New York, where he was apprehended nearly ten months later. Speigner told the New York police that he knew the Cleveland police had been looking fcr him. He also admitted that he had known Bell as well as Scctt. An examination of Bell's car on June 26, 1973 showed a shattered vent window on the driver's side, window glass on the front floor, type A blood stains on the rear seat, and a bloody fingerprint on the right front door. A sawed-off shotgun was found under the front passenger seat where Speigner had been sitting when the car was stopped. Bell was shown to have type A blood, but scientists could not connect the shotgun to Speigner; it was not test fired, nor proved to be one of the two murder weapons. The Sixth Circuit concluded there was no evidence (1) to show how long Speigner

had been in the car prior to 7:00 a.m., (2) to connect him to the shotgun, (3) that the shotgun was the murder weapon, (4) that Speigner had recently used a gun of any kind, and (5) that Speigner had recently been involved in a fight. While the evidence would have supported a guilty verdict for possessing a stolen car or for obstruction of justice, the latter because Speigner had apparently cooperated with Scott in giving a false rental story and then evaded the police for ten months, it was not sufficient to support a verdict of guilt on the charge of second degree murder. Ohio law requires that the defendant have actually killed or participated in the killing of the victim. Chief Judge Edwards remarked in a concurring opinion that Speigner might also have been guilty of the common law offense of accessory after the fact of murder. Judge weick, dissenting, would have denied the writ.

The grant of the writ to the co-defendant, Scott, was reversed by a different panel. Scott testified at the trial, and was shown to have

given at least three versions of what had happened. Judge Jones dissented from the denial of the writ. Now Chief Judge Merritt, concurring, stated his belief that the circumstantial proof was strong (662 F.2d at 436):

> The defendant was found in flight in the dead man I s car within a f ew hours of the murder, with the sawed off shotgun which was most likely the murder weapon under the seat. Thereafter, he made three different inconsistent statements about how he came into possession of the automobile. This ought to be suf f icient circumstantial evidence f or a rational jury to convict under Jackson v. Virginia, , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), if, after weighing this and all the other evidence, the jury firmly believes that the defendant is guilty of the murder beyond a reasonable doubt.

2. Judge Feikens issued the writ which overturned a felony murder conviction in Fuller v. Anderson, and his decision was upheld by the Sixth Circuit in a split decision. 662 F.2d 420 (6th Cir. 1981). The Supreme Court then denied certiorari, over a vigorous and caustic dissent by Chief Justice Burger, joined in by Justice

O'Connor 455 U.S. 1028 (1982). Justice Stevens stated in support of the denial of the state's request for review his conclusion that the majority of the panel in the Court of Appeals had determined only that there was no evidence Fuller had done anything except to be present when a home was fire-bombed, which had in turn caused the death of two children inside. He quoted the following from 662 F.2d at 424:

> "The district court correctly concluded that the evidence introduced at petitioner's trial only showed that on the morning of May 18 Fuller was present at the Turner residence along with Zerious Meadows and the other boys. The evidence showed that Fuller looked around while Meadows started the fires. But as Judge Feikens pointed out:
>
> "'This *suggests,* as Jeffery Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury f ind it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew Zerious Meadows planned to do *[sic]* is simply too meager to support conviction.' (emphasis in original)

"We note that there was no evidence at trial that the 'Molotov cocktail' which started the fire was prepared in advance, or, if it was, whether any of the boys other than Zerious Meadows knew that the 'Molotov cocktail I existed. There was of course no evidence that any of the boys, except Fuller *[sic]*, participated in the manufacture of the 'Molotov cocktail'.

"Moreover, there was no direct evidence that the youths approached the Turner house with intent to set the house on fire. Assuming Zerious Meadows had this intent, however, there was no evidence that it was shared by petitioner or the other boys.

"The only direct evidence supporting the State's contention that Fuller "stood guard and acted as a lookout' for Zerious Meadows was Jeffery Coleman's testimony that over a period of several minutes Fuller turned his head from side to side 'more than twice.' We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid meadows, commission of arson." Id., at 424.

3. The Fifth Circuit reversed a district judge's denial of the writ, and ordered the

discharge of a defendant convicted as accessory to murder in Isham v. Collins, 904 F.2d 67 (5th Cir. 1990). The mere fact that the defendant was present at the scene of an altercation between his two driving companions and did nothing to prevent one from stabbing the other was not deemed sufficient to show beyond a reasonable doubt that he *was* an accessory to the murder, even though he later disposed of the knife. The Texas law regarding an accessory is similar to the Michigan law on aiding and abetting. See 905 F.2d at 69.

H.

As noted supra, petitioner's reply brief advances a second supposed ground for relief. Labeled "Motion to Suppress" (Reply Brief at p. 5), this ground is that the trial court ordered no reference to be made to any alleged vandalism of various cars, yet the prosecutor constantly referred to the allegedly forbidden subj ect matter. This ground was not advanced by petitioner's counsel in his appeal to the Michigan Court of Appeals and should be deemed unavailable

for federal habeas review purposes. If the Court does not agree, respondent should be allowed an opportunity to reply to this amended petition.

III. NOTICE TO PARTIES:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided in 27 U.S.C. section 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitute a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985), Howard v. Secretary of HHS., 932 F.2d 505 (6th Cir. 1991). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Repo—t and Recommendation. Smith v. Detroit Fedln of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this

Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objection.

/s/_____
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: September 9, 1993

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellce,

v

JAMES EUGENE MUSTIN, HARRY LEON HOUSTON, and ROBERT LOUIS CHATMAN, JR.,

Defendants-Appellants.

June 4, 1992
Nos. 116199;118929;120544

Bcfore: Murphy, P.J., and Gillis and Wahls, JJ.

PER CURIAM.

In this consolidated appeal, the three defendants were convicted in a joint trial before a jury of second-degree murder, MCL.750.317; MSA 28.549. Defendant Houston was also convicted of assault with intent to do great bodily harm, MCL 750.83; MSA 28.278. All three now appeal as of right, raising a host of issues. We affirm.

At approximately 2:30 a.m. on September 4, 1988, the victim and five male friends were playing basketball at a park. Before they began to play, they noticed defendants' blue Ford automobile drive past. About an hour later, they

discovered that their automobiles had been vandalized and at least two members of the group saw defendants' Ford leaving the scene. When defendants' Ford returned, the victim and his friends armed themselves with tools from their vehicles' trunks, and one person struck defendants' Ford with a pair of bolt cutters as it drove past. Defendints circled the block, parked and turned out the Ford's headlights, then got out of the car. All of the basketball players except the victim fled to a nearby drugstore where one of them telephoned the police.

After his companions fled, the victim met a man on a bicycle named Titus and told him what had happened. When the players and the police returned the scene, they discovered that Titus had been beaten and was incoherent. At the same time, defendants reappeared at the scene in a different automobile and, upon being identified by the players, fled on foot with the police and at least one of the players in pursuit. Defendants were apprehended shortly thereafter. The victim was found a short distance from Titus and soon died. The victim had been beaten to death with a chain.

Titus testified at trial that he had heard a cry for help and had pedaled toward the players' vehicles. When Titus reached the automobiles, the defendants stepped out from behind the automobiles and defendant Houston began to strike Titus in the face with his fist. At the same time, Mustin and Chatman chased and eventually brought down the victim. Houston took a bicycle chain and lock from Titus after striking him four to six times, then walked over to Mustin, Chatman, and the victim. Titus observed Houston and Chatman begin to beat the victim with the

chain. After Houston arrived, Mustin did not take part in the beating, but stood by and watched.

We will consider each of the defendants' appellate arguments separately.

No. 116199 (Mustin)

Mustin raises three issues oil appeal. Mustin first claims that tile trial court crred when it failed to grant his motion to dismiss, brought at the close of the prosecutor's opening statement. We disagree. Such dismissals are discouraged, particularly where a jury has been called. People v Recorder's Court Judge, 78 Mich App 576, 579; 261 NW2d 8 (1977), lv den 402 Mich 879 (1978). The prosccutor's opening statement set fortli the theory that Mustin had aided and abetted in the murder. The trial court did not abuse its discretion. Id.

Mustin next claims generally that the trial judge was biascd against him. Defendant appears to equate the trial judge's denial of his motion for a directed verdict with bias and argues that "[t]he reasons advanced by the Court for not granting Defcndant's Motion and permitting the case against Mr. Mustin to go to the jury indicate how completely the court accepted the innuendos and assumption of the facts advanced by the prosecutor . . . ."[1] Our review of the record shows that the trial judge did no more than apply the proper test for deciding a motion for a directed verdict. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980). Because defendant cites no other instances of alleged bias and never moved to disqualify the trial judge, we decline from further review of this issue.

Finally, although the issue is not clearly argued, Mustin implies that the trial court erred as a matter of law when it denied his motion for a directed verdict. In reviewing the trial court's denial of defendants motion, we will examine the evidence presented during the prosccutor's case, view that evidence in a light most favorable to the prosecutor, and determine whether a rational trier of fact could have found that he essential elements of the crime were proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980); People v Coddington, 188 Mich App 584, 599; 470 NW2d 478 (1991).

As noted previously, Titus, the only witness to the murder itself, testified that Mustin did not participate in the beating, but only chased the victim down with the help of Chatman. Mustin then stood by as Houston and Chatman beat the victim to death. Nonetheless, we believe that the prosccutor's proofs allowed a rational trier of fact to conclude beyond a reasonable doubt that Mustin was guilty of second-degree murder on an aiding and abctting theory.

A person who procures, counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense. MCL 767.39; MSA 28.979. The phrase "aiding and abetting" describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which may support, encourage or incite the commission of a crime. People v Palmer, 392 Mich 370, 378; 220 NW2d 393 (1974); People v Victini, 141 Mich App 486, 49S; 367 NW2d 887 (198S). A defendant would be guilty of aiding

and abetting a crime upon proof that (1) the substantive criminal offense was committed by the defendant or by another, (2) the defendant performed acts or gave encouragement which aided or assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the,principal intended its commission at the time of giving aid or encouragement. People v Rockwell 188 Mich App 405, 411; 470 NW2d 673 (1991); People v Beard, 171 Mich App 538, 541-542; 431 NW24 232 (1988). Mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor. Vicuna, supra.

Mustin was tried for aiding or abetting second-degree murder. Second-degree murder is committed if the actor entertains one of three possible intents: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm will probably result. People v Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984), People v Flowers, 191 Mich App 169, 176; __ NW2d __ (1991). Intent is a question of fact to be inferred from the circumstances by the trier of fact. Flowers, supra, at 178.

Our review of the record shows that the jury could have easily inferred from the evidence that Mustin and his colleagues were spoiling for a fight from early on. The evidenceestablished more than Mustin's "mere presence" at the murder scene. Mustin performed an act that assisted in the commission of the offense -- chasing down and capturing the victim with Chatman, thereby allowing Chatman and Houston,to kill the victim. This act was performed after Houston assaulted

Titus in Mustin's presence. When the prosecutor's evidence is viewed as a whole, the trier of fact could have reasonably concluded either (1) that Mustin aided the commission of the offense and that Mustin himself intended that great bodily harm be inflicted on the victim, one of the three intents that will support a conviction for second-degree murder, or (2) that Mustin knew at the time he aided the offense that Chatman and Houston intended to inflict great bodily harm on the victim. The trial court properly denied Mustin's motion for a directed verdict

No. 118929 (Houston)

Houston first claims that Titus' in-court identification of him at trial was impermissible because Titus' confrontation with Houston at the preliminary examination was suggestive and Titus had no independent basis on which he could identify Houston. This issue merits little discussion, for any error was harmless beyond a reasonable doubt. Houston testified on his own behalf at trial and admitted that he had struck Titus, although he claimed that he was acting in defense of Mustin. Titus' in-court identification had no effect on the verdict People v Anderson, 389 Mich 155, 169; 205 NW2d 461 (1973); People v Hampton 138 Mich App 235, 239; 361 NW2d 3 (1984).

Houston next claims that the prosecutor made an improper comment during his opening statement that placed the prestige of his office behind the charges against Houston. This issue was preserved by an objection and argument, ad nauseam, below. Even if the brief comment could be considered improper, we believe that any prejudice was dissipated by the trial court's curative instruction and that the comment did

not deny Houston a fair trial, the ultimate test for alleged prosecutorial misconduct. People v Saunders, 189 Mich App 494,496; 473 NW2d 755 (1991); People v Foster 175 Mich App 311, 317; 437 NW2d 395 (1989).

Houston claims that the verdict was against the great weight of the evidence because testimony showed that he acted in the heat of passion, thereby mitigating the offense and reducing it to manslaughter. A motion for a new trial was necessary to preserve this issue for review. People v Strong, 143 Mich App 442, 450; 372 NW2d 335 (1985). Houston moved for a new trial on this basis, but has not provided this Court with a transcript of the hearing on his motion or any other record by which we could review the decision of the trial court. This issue is not properly before us. People v Calloway , 169 Mich App 810, 817; 427 NW2d 194 (1988), vacated on other grounds 432 Mich 904 (1989); People v Coons, 158 Mich App 735, 740; 405 NW2d 153 (1987), lv den 428 Mich 900 (1987).

Finally, Houston argues that it was incumbent upon the trial court to reread the instructions on self-defense and the defense of others to the jury after the jury had requested only that the instructions on second-degree murder and manslaughter be reread. Houston his abandoned this issue on appeal by his failure to cite any authority in support of his argument. People v Daniels, 172 Mich App 374, 378; 431 NW2d 846 (1988), Iv den 433 Mich 906, (1989).

No. 120544 (Chatman)

Chatman first claims that the prosecutor deliberately struck black potential jurors from

the venire and that the action was racially motivated. The record does not show that the prosecutor exercised a single prcemptory challenge on a black member of the jury panel. Chatman's theory, however, is that the prosecutor exercised peremtory challenges against white jurors in a manner that excluded blacks. Chatman claims that the prosecutor's use of peremptory challenges left the parties unable to pick a jury from the March venire, which contained two black members who had been seated on the jury, and that as a result the March venire was excused at the end of its term and jury selection resumed with the April venire, which contained only one black member. This potential juror was later excused for cause. This issue was partially addressed during voir dire and again at the hearing on Chatman's motion for a new trial. We agree with the trial court that Chatman failed to show a prima facie case of racial discrimination. Batson v Kentucky, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); People v Williams 174 Mich App 132; 435 NW2d 469 (1989).

Chatman claims that the verdict is not supported by the evidence, or that the verdict is against the great weight of the evidence because Cliatman acted in self-defense. People v Hampton 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980); People v Strong, 143 Mich App 442, 450; 372 NW2d 335 (1985). We disagree. Chatman confessed his role in the crime to the police, stating that the victim had swung a tire iron at him, then dropped the topl and fled. Chatman pursued him, they fought, then Chatman struck him with the chain six or seven times.[2] Chatman thus did not retreat from the alleged attack by the victim, but instead chose to pursue and inflict harm upon the victim

after the alleged attack had ended. See CJI 2d 7.16; People v Stallworth, 364 Mich 528, 535; 111 NW2d 742 (1961); People v Mroue, 111 Mich App 759, 765; 315 NW2d 192 (1981). The trial court properly denied Chitman's motions for a directed verdict and for a new trial

Chatman next claims that he was denied a fair trial by three comments made by the prosecutor that denigrated his counsel. Even on the cold record before us, the heated nature of this trial and counsels' acrimony toward one another is obvious. Chatman preserved this issue by objecting to the comments, and the trial court gave curative instructions in response. We will not presume that the jury ignored the court's curative instructions and do not believe that Chatman was denied a fair trial. Sanders, supra; Foster, supra.

Chatman claims that the trial court erred when it refused to instruct the jury with CJI 7:9:1 [now, CJI 2d 7.24], the instruction on self-defense in the face of multiple attackers. We disagree. Viewing the self-defense instructions that were given and the trial court's instruction on Chatman's theory of the case as a whole, we conclude that the jury was adequately instructed. People v Wolford, 189 Mich App 478,481; __ NW2d __ (1991).

Finally, Chatman claims that his sentence is excessive. Chatman was sentenced to a term of twenty to sixty years' imprisonment. The sentencing guidelines had recommended a minimum sentence range of between four to fifteen years. The sentencing judge's stated reasons for his departure were the brutality of the offense, which the sentencing judge referred to as

"extremely severe and senseless," and the harm caused to the victim's family.

According to People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990), a departure from the guidelines' recommendation is appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. Id 657. Normally, where there has been a departure from the guidelines, our inquiry is directed to whether circumstances exist in a case that are not adequately reflected In the variables used to score the guidelines. Id at 659-660.

In the present case, Chatnian scored zero on the prior record variables, but scored ten points on OV 3 [intent to injure]. The instructions to OV 3 state that ten points should be assessed where a killing is intentional within the definitions of second-degree murder, but the death occurred in a combative situation or in response to a victimization of the defendant by the victim. OV 4 allows a sentencing judge to score 25 points in cases of aggravated physical injury. OV 13 allows the assessment of five points in cases of severe psychological injury to a victim's family. It appears to us that the sentencing judge was somewhat lenient in his scoring of defendant, for, despite the brutality of the offense (which is amply supported by the record) and the injuries to the victim's family, no points were assessed under OV 4 or OV 13. Had the sentencing judge done so, the guidelines would have recommended a minimum sentence range of eight to 25 years, and Chatman's sentence would be presumed proportionate. People v Broden, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

We conclude that the reason for departure was not adequately reflected in the guidelines' offense variables as the variables were scored in this case. We do not believe that the sentence imposed was an abuse of discretion.

Affirmed.

/s/ William B. Murphy
/s/ John H. Gillis
/s/ Myron H. Wahls